FILED
FEB 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-764

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD FREDERICK,
Petitioner,

v.

STATE OF FLORIDA
Respondent.

On Petition for a Writ of Certiorari to the
District Court of Florida, Fourth District

PETITION FOR REHEARING

DAVID W. COLLINS, Esquire
Florida Bar Number 475289
Law Office of David W. Collins
310 North Jefferson Street
Monticello, Florida 32344-2057
Phone: (850) 997-8111
Facsimile: (850) 997-5852

Counsel for Petitioner

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner, Edward Frederick, respectfully petitions the Court for rehearing of its denial if his petition for certiorari issued on January 22, 2007. The grounds for this petition are that there are substantial grounds not previously presented that warrant rehearing in order to protect Petitioner's substantial rights to due process and a unanimous jury verdict.

DISCUSSION

In light of the Court's denial of Petitioner's petition for certiorari, Petitioner feels there are substantial violations of his constitutional rights which were not previously presented.

The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *E.g., In re Winship,* 397 U. S. 358, 364 (1970). The historical foundation for these principles extends down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislatures. *See, e.g., United States v. Tucker*, 404 U. S. 443, 447 (1972).

Legislatures have the power to make all of the important initial decisions about the criminal law and procedure in their jurisdiction. Offenses exist and are defined as the legislatures choose and the appropriate level of punishment that should be available for each offense can be set by statute. Thus, at least presumptively, legislatures have power both to define offenses and regulate sentences.

Just as a defendant may only be charged with an offense enacted by the legislature, and may only be

convicted of a crime for which he has been charged,[1] a defendant also may only be sentenced for a crime for which he has been convicted. What the constitution's structure commands, therefore, is that legislatures not be permitted to exercise their offense-defining and sentencing-regulating powers in a way that contravenes the limitation of the sentence to the terms of the offense of conviction.

Offenses must be defined by the legislature with sufficient clarity that courts can determine their scope and ensure that the sentence imposed on the defendant is consistent with the offense of conviction. The constitution prohibits any action at a sentencing hearing that inflicts a punishment not authorized by the legislature for the offense. Such an action would occur, for example, if the sentencing judge punished a defendant for an offense for which he has not been convicted, or conversely, if the judge's sentence amounted to "convicting" the defendant of an additional offense that was not charged or that is not supported by a guilty verdict.

If the core concept of the offense of conviction is not protected by this principle, the entire structure of criminal procedure in the constitution will be destroyed. Legislative intent to grade between more serious and less serious crimes can be defeated if the lower penalties for the less serious offenses do not limit the sentence.

The requirement of a trial jury verdict beyond a reasonable doubt (or of a knowing, intelligent, and voluntary guilty plea) becomes meaningless if the judgment of conviction does not restrict the scope of the penalty.[2]

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[1] By definition, lesser-included offenses are fully encompassed within the charged offense, and therefore instructing a jury on lesser-included offenses not specifically listed in the charging instrument is constitutional. *See, e.g., Carter v. United States*, 530 U.S. 255 (2000)

[2] *Jones v. United States*, 526 U.S. 227, 243-44 (1999) (insisting that "the jury's role [must not] shrink from the significance usually carried by determinations of guilt to the relative importance of

Only if the offense of conviction binds the range of punishment available at sentencing can this constitutional edifice be preserved. To do otherwise would vitiate the significant constitutional protections guaranteed by the constitutional structure. The historic inseparability of verdict and judgment and the consistent limitation on judges' discretion highlight the novelty of a scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone.

In the case at bar, the Petitioner was accused of certain criminal behavior which carried a penalty of no more than fifteen years if the victim was under the age of sixteen, but carried a mandatory penalty of life in prison if the victim was under the age of twelve. The state legislature's own enactment does not provide for a sentence of life in prison for every commission of this criminal behavior. Only when the jury finds conclusively that the victim was under the age of twelve can the enhanced penalty be given.

The jury's verdict was that they found Petitioner "guilty as charged." The state had charged that the criminal behavior occurred at some instant in time, "on or between" a range of dates that included the victim's twelfth birthday. Thus, according to the jury's verdict, the criminal behavior they found Petitioner guilty of committing occurred during a period of time that includes times when the victim was under the age of twelve, but also a period of time, albeit a short one, when the victim was not under the age of twelve, but was under the age of sixteen. The question Petitioner now poses to this Court is how should this verdict be interpreted as to what sentence the court may impose without violating Petitioner's substantial rights under the Florida Constitution as well as the U. S. Constitution?

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low-level gatekeeping").

While Florida's constitutional guarantee of a jury trial [Art. I, §§ 16, 22, Fla. Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of the state to require such unanimity in all criminal jury trials. The Florida supreme court has promulgated Florida Rule of Criminal Procedure 3.440 (1968 to present) to memorialize this long-standing practice, stating: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it."[3] Prior to the adoption of the Florida Rules of Criminal Procedure in 1967, the requirement of unanimity in jury verdicts was provided by statute in section 919.09, Fla. Stat. *See Dixon v. State,* 206 So. 2d 55, 57 (Fla. 4th DCA 1968).

Furthermore, it is generally accepted defendants have a substantial right to a unanimous jury verdict granted by Article III, § 2, and the Sixth Amendment of the United States Constitution. *See Hibdon v. United States,* 204 F. 2d 834 (6th Cir. 1953) (A defendant's right to a unanimous verdict can under no circumstances be waived, as acceptance of a majority verdict would destroy the due process requirement that guilt must be established by, "proof beyond a reasonable doubt."); *See also Andres v. United States,* 333 U.S. 740, 748 (1948) (Unanimity in a jury verdict extends not only to the issue of guilt, but to all other issues that are left to the jury.)

Applying the due process right to a unanimous jury verdict to the case at bar, the jury verdict cannot be interpreted as a finding that the jury unanimously found Petitioner committed the criminal behavior at a time when the victim was under twelve because one or more jurors may have felt the criminal behavior occurred on the victim's twelfth birthday. However, it can be said that the jury's verdict is unanimous as to the

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[3] The Florida Constitution requires that the practice and procedure in all courts be governed by rules adopted by the Supreme Court. *State v. Garcia*, 229 So. 2d 236, 237 (Fla. 1969)

criminal behavior being committed at a time when the victim was under sixteen.

The symbiotic relationship between crime and punishment requires that a single crime can correspond to only one single range of punishment. Therefore, any fact that changes the range of punishment to which a defendant is exposed, upper or lower limit, defines a separate crime. The range-changing fact is not merely a fact to which jury trial rights attach; it is an element of a different crime. If a fact relating to the commission of a crime is significant enough to increase the range of possible punishment to which a defendant is exposed, then (as Justice Scalia might phrase it) it is not too much to ask our criminal justice system to find that fact beyond a reasonable doubt. *See Blakely v. Washington,* 124 S. Ct. 2531, 2543 (2004)("The Framers would not have thought it too much to demand that, before depriving a man . . . of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State.") (citation omitted).

Because the state court sentenced Petitioner to life without a unanimous jury verdict on an element the legislature has defined must be proven beyond a reasonable doubt in order for such a penalty to be given, it is patent that the state court has acted *ultra vires* as Petitioner's sentence is not authorized by the offense of conviction as established by the verdict of the jury. By imposing upon Petitioner a sentence of life imprisonment, the state court has "sentenced" Petitioner for a crime for which he was not convicted by unanimous jury verdict. To sentence a defendant for a crime for which he has not been convicted is a clear violation of basic due process principles, a violation which no amount of due process balancing can excuse. *See Cole v. Arkansas,* 333 U.S. 196, 201 (1948). A criminal defendant has the right to be sentenced for the crime, and only that crime, to which he has been found guilty by a jury beyond a reasonable doubt. *Id.*

Accordingly, Petitioner's sentence of life imprisonment – or for that matter any term of imprisonment between fifteen years plus one day and life – on either his Count 1 or Count 2 is unconstitutional.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests the Court to grant his petition for rehearing.

Respectfully submitted,

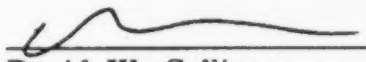
David W. Collins
Florida Bar No. 475289

Law Offices of David W. Collins
310 N. Jefferson Street
P.O. Box 541
Monticello, Florida 32345
Phone: (850) 997-8111
Facsimile: (850) 997-5852

Counsel of Record for Petitioner

CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.



David W. Collins
Counsel of Record for Petitioner

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 22, 2007

Mr. David Walter Collins
310 North Jefferson Street
Monticello, FL 32344-2057

Re: Edward Frederick
v. State of Florida
No. 06-764

Dear Mr. Collins,

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk